

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant-Cross
Defendant,

and

DAKOTA ACCESS, LLC,

Defendant-Intervenor-
Cross Claimant.

Case No. 1:16-cv-1534-JEB
(and Consolidated Case Nos. 16-cv-1796 and
17-cv-267)

**REQUEST TO STRIKE NOTICE OF
APPEARANCE OF PATRICIA A.
MARKS**

COMES NOW Plaintiff-Intervenor, the Cheyenne River Sioux Tribe (“Tribe”) and hereby submits this Request to Strike Appearance of Patricia A. Marks as she was not authorized by the Tribe or any officer or representative of the Tribe to either enter her Notice of Appearance or remove the Tribe’s counsel of record, Nicole Ducheneaux and Joseph Messineo. In fact, Ms. Marks was explicitly instructed not to file anything on behalf of the Tribe. The Tribe and undersigned counsel were unwitting participants in this, frankly, strange and embarrassing episode and hereby request that this Court restore the status quo by granting the re-entered Notices of Appearance of Ms. Ducheneaux and Mr. Messineo, filed contemporaneously, and removing Ms.

Marks as counsel of record and removing her name from service lists and other notifications related to this matter.

On April 1, 2019, the Tribe's counsel of record Ms. Ducheneaux and Mr. Messineo departed Fredericks Peebles & Morgan LLP ("FPM") and joined a newly created law firm, Big Fire Law & Policy Group LLP ("Big Fire"), which is located at 1404 Fort Crook Road South, Bellevue, NE 68005. FPM reorganized and became known as Fredericks Peebles & Patterson LLP ("FPP"). FPP retained control of the address associated with FPM's representation in this matter, 3610 North 163rd Street, Omaha, NE 68116, until April 30, 2019 and both firms continue to receive mail that is sent to that address to this date and for the foreseeable future. Declaration of Nicole Ducheneaux at 2.

Both Big Fire and FPP properly provided notice to the Tribe of Ms. Ducheneaux's and Mr. Messineo's departure from FPM firm prior to April 1, 2019. Declaration of Harold Frazier at 2. However, the Tribe's governing body, the Cheyenne River Sioux Tribal Council, only meets once a month and did not have time to fully consider whether it would retain FPP, Big Fire, or choose to hire other counsel to represent it in the instant matter until Friday, May 10, 2019. Declaration of Harold Frazier at 3.

On April 15, 2019, Patricia A. Marks of FPP contacted both Ms. Ducheneaux and Tracey A. Zephier, the Tribe's Chief Legal Officer and Attorney General of the Cheyenne River Sioux Tribe, to advise that Ms. Marks intended to enter her Notice of Appearance in this matter in light of her concern that FPP had an obligation to advise the Court within 14 days of any change of address per LCvR 83.15(c). Attorney General Zephier and Ms. Ducheneaux consulted one another and agreed that neither FPP nor Big Fire was in danger of violating LCvR 83.14(c)'s change of address rule and that Ms. Zephier should appear Pro Hac Vice in this matter in order to protect the interests of the Tribe during this brief period of uncertainty concerning its counsel in this matter.

ECF 413. This Court subsequently granted that motion. Thereafter, Attorney General Zephier explicitly instructed Patty Marks and other attorneys of FPP via email that they were not authorized to file any Notice of Appearance or Substitution of Counsel on behalf of the Tribe as the Tribe had not selected FPP to represent it in this matter. Declaration of Tracey A. Zephier (“Zephier Decl.”) at Exhibit A. On April 15, 2019, between 5:44 p.m. and 5:52 p.m., after receiving and acknowledging Attorney General Zephier’s email correspondence, Ms. Marks filed her Notice of Appearance and Substitution of Counsel and Motion to Remove Ms. Ducheneaux and Mr. Messineo (ECF 414, 415, and 416), notwithstanding Attorney General Zephier’s explicit instructions. This Court granted Ms. Marks’ motion on April 22, 2019.

It is unclear why Ms. Marks felt empowered to act in this manner. FPP attorneys neither sought nor received permission of the Cheyenne River Sioux Tribal Council or its Chief Executive Declaration of Harold Frazier at 4, and they defied the explicit instructions of Attorney General Zephier in filing its Notice of Appearance and Substitution of Counsel naming Patricia Marks as counsel of record and withdrawing Ms. Ducheneaux and Mr. Messineo. On May 10, 2019, the Tribal Council met and voted to retain Big Fire Law & Policy Group LLP to continue to represent it in this litigation. Declaration of Harold Frazier at 3. To add insult to injury, the Tribe was not informed by FPP that Ms. Marks also was counsel of record for the Yankton Sioux Tribe in this matter and she apparently was going to simultaneously represent both Tribes as lead counsel. It has always been the Tribe’s ***sole and solemn sovereign authority*** to select the counsel of its choice. The days of outsiders making such decisions on behalf of Indian people are long over. During the period that it was undecided, the Tribe empowered Attorney General Zephier to represent it. On May 10, 2019, it selected Ms. Ducheneaux and Mr. Messineo to represent it. ***The Tribe never selected Ms. Marks as its counsel and never authorized her to file anything on its behalf.*** Consequently, the Tribe hereby requests that this Court strike Ms. Marks’s Notice of Appearance

and Motion to Remove Ducheneaux and Messineo and grant their re-entered Notices of Appearance.

Dated: May 14, 2019

Respectfully submitted,

/s/ Nicole E. Ducheneaux
Big Fire Law & Policy Group LLP
1404 South Fort Crook Road
Bellevue, NE 68005
Telephone: (531) 466-8725
Facsimile: (531) 466-8792
Email: nducheneaux@bigfirerlaw.com

/s/ Tracey A. Zephier
Tracey A. Zephier, *pro hac vice*
Cheyenne River Sioux Tribe
Office of the Attorney General
P.O. Box 590
Eagle Butte, SD 57625
Telephone: (605) 964-6686
Facsimile (605) 964-1160
Email: crstag@protonmail.com

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Nicole E. Ducheneaux

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Defendant.

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DAKOTA ACCESS, LLP,

Intervenor-Defendant.

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**DECLARATION OF HAROLD C.
FRAZIER IN SUPPORT OF REQUEST
TO STRIKE NOTICE OF APPEARANCE
OF PATRICIA A. MARKS**

I, Harold C. Frazier, declare as follows:

1. I am the Chairman of the Cheyenne River Sioux Tribe. I was elected to that position in 2014 and reelected in 2018. I was previously the Tribal Chairman from 2002-2006, and also served as a tribal council representative from 1998-2002.

2. I received notice that Fredericks Peebles & Morgan LLP was dissolving and separating into two firms- Big Fire Law & Policy Group LLP (“Big Fire”) and Fredericks Peebles & Patterson (“FPP”) prior to April 1, 2019.

3. On May 10, 2019, the Cheyenne River Sioux Tribal Council elected to retain Big Fire, specifically Nicole E. Ducheneaux and Joseph V. Messineo represent the Tribe in this matter.

4. FPP neither sought nor received permission from me or the Tribal Council to represent the Tribe in this matter or to file any documents in this litigation on our behalf.

I declare under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated: May 14, 2019



Harold C. Frazier

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Defendant.

and

DAKOTA ACCESS, LLP,

Intervenor-Defendant.

I, Tracey A. Zephier, declare as follows:

1. I am the Attorney General for the Cheyenne River Sioux Tribe (“Tribe”).
2. A true and correct copy of April 15, 2019 email that I sent to Patricia Marks at 2:17 p.m is attached hereto as **Exhibit A**.

I declare under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated: May 14, 2019

Tracey Zephier

Tracey A. Zephier

Case No. 1:16-cv-1534-JEB

CHEYENNE RIVER SIOUX TRIBE

EXHIBIT A

From: [CRST Attorney General](#)
To: [Sarah Whitford](#)
Cc: [Nikki Ducheneaux](#)
Subject: Fw: Dakota Access - substitution of counsel
Date: Tuesday, April 16, 2019 3:59:43 PM

Fyi...

Sent from ProtonMail mobile

----- Original Message -----

On Apr 15, 2019, 2:17 PM, CRST Attorney General <CRSTAG@protonmail.com> wrote:

Good afternoon, Patty. I was just informed that your firm is planning to file a substitution of counsel with the DC circuit court naming yourself as counsel in the Dakota Access matter on behalf of CRST . As I explained to you already on the phone earlier today, I do not want your firm to file anything on behalf of the Cheyenne river Sioux tribe in the DAPL matter at this time.

You informed me that there is a deadline of today that requires your firm to remove the departing attorneys from any matters which were originally being represented by your firm. I wish your firm would have given my tribe a little more than one business day advance warning of the impending deadline. Nevertheless, today I am filing a substitution of counsel with the court naming myself as counsel for CRST in the DAPL matter, so please do not file anything. As soon as I get it filed I will send you a copy for your records. That should alleviate your firm's responsibility in that matter.

I also explained to you on the phone CRST's opinion about the contract from 2011. While it is technically still a legally binding contract, the tribe does not wish to do any further business with the firm under that contract because it has switched to annual contracts with all its outside attorneys. Therefore, unless and until you hear further from me, please discontinue doing any legal work for CRST.

As I requested in my letter of last week, I would still like to have your firm send me an electronic and/or paper version of the dapl files that you have in your possession at this time. Would that be possible?

Thank you.
Tracey Zephier
CRST Attorney General

Sent from ProtonMail mobile

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**DECLARATION OF NICOLE E.
DUCHENEAUX IN SUPPORT OF
REQUEST TO STRIKE NOTICE OF
APPEARANCE OF PATRICIA A.
MARKS**

I, Nicole E. Ducheneaux, declare as follows:

1. I was previously counsel of record for the Intervenor-Plaintiff Cheyenne River Sioux Tribe (“Tribe”). I was removed from this case on April 22, 2019.
2. As of April 1, 2019 I joined a newly created law firm called Big Fire Law & Policy Group LLP which is located at 1404 Fort Crook Road South, Bellevue, NE 68005. The law firm I was formerly associated with- Fredericks Peebles & Morgan LLP reorganized and became known as Fredericks Peebles & Patterson LLP (“FPP”). FPP retained control of the address associated with FPM’s representation in this matter, 3610 North 163rd Street, Omaha, NE 68116, until April 30, 2019 and both firms continue to receive mail that is sent to that address to this day and for the foreseeable future.

I declare under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated: May 14, 2019



Nicole E. Ducheneaux